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IN THE

Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

JESSICA RING AMUNSON
Counsel of Record
JOSHUA M. PARKER
CORINNE M. SMITH
LEONARD R. POWELL*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Admitted in California only; supervised by principals of the firm

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. A Guilty Plea Does Not Inherently Waive The Right To Challenge The Constitutionality Of The Statute Of Conviction. 3

A. This Court Should Not Abandon Its Principled Approach For Determining Which Claims Are Preserved Post-Plea In Favor Of The Government's Unprincipled Approach. 3

B. The Government's Attempts To Undermine Petitioner's Interpretation Of *Blackledge* and *Menna* Are Unavailing. 10

C. Petitioner's Retroactivity Analogy Is Sound. 13

II. Petitioner Was Not Required To Enter A Conditional Plea Under Rule 11(a)(2) To Preserve His Constitutional Challenges. 16

A. The Advisory Committee Note Supports Petitioner's Position That A Constitutional Challenge To The Statute Of Conviction Is Not Subject To Rule 11(a)(2) 17

B. Petitioner's Proposed Default Rule Fully Addresses The Government's Finality, Efficiency, And Clarity Concerns. 19

C. Practical Considerations Weigh In Favor Of Adopting Petitioner's Proposed Default Rule. 21

III. In The Alternative, The District Court's Misrepresentation Of The Default Effect Of Petitioner's Plea Requires Remand To Determine Whether Petitioner's Plea Was Voluntary, Knowing, And Intelligent. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Alexander v. Cockrell, 294 F.3d 626 (5th Cir. 2002) 8

Blackledge v. Perry, 417 U.S. 21 (1974) 1, 5, 6, 8

Bousley v. United States, 523 U.S. 614 (1998) . 8-9, 23

Boykin v. Alabama, 395 U.S. 238 (1969) 11

Brady v. United States, 397 U.S. 742 (1970) ... 7, 8, 23

Briley v. Wilson, 376 F.2d 802 (9th Cir. 1967) ... 11-12

Crawford v. United States, 501 F. App'x 943 (11th Cir. 2012) 14

Crist v. Bretz, 437 U.S. 28 (1978) 5

Duhart v. United States, No. 0:16-cv-61499-KAM, 2016 WL 4720424 (S.D. Fla. Sept. 9, 2016), *appeal docketed*, No. 17-11476 (11th Cir. Apr. 3, 2017) 15

Ellis v. Dyson, 421 U.S. 426 (1975) 12

Haring v. Prosise, 462 U.S. 306 (1983) 12, 13

Haynes v. United States, 390 U.S. 85 (1968) 11

Hughes v. United States, 371 F.2d 694 (3d Cir. 1967) 11

Johnson v. United States, 135 S. Ct. 2251 (2015) 15

Kontrick v. Ryan, 540 U.S. 443 (2004) 19

Lafler v. Cooper, 566 U.S. 156 (2012) 21

Libretti v. United States, 516 U.S. 29 (1995) 10

Marchibroda v. United States, 368 U.S. 487 (1962) 12

Martinez v. Illinois, 134 S. Ct. 2070 (2014) 5

Menna v. New York, 423 U.S. 61 (1975) 1, 5, 7, 12

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 9

Missouri v. Frye, 566 U.S. 133 (2012) 21

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 8, 21

North Carolina v. Alford, 400 U.S. 25 (1970) 11

Phillips v. United States, 734 F.3d 573 (6th Cir. 2013) 14

Pinkerton v. United States, 328 U.S. 640 (1946) 10

Puckett v. United States, 556 U.S. 129 (2009) 3

Sanford v. United States, 841 F.3d 578 (2d Cir. 2016) 14

TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S. Ct. 1514 (2017) 24

Tollett v. Henderson, 411 U.S. 258 (1973) 6, 7, 24

United States ex rel. Glenn v. McMann, 349 F.2d 1018 (2d Cir. 1965) 12

United States v. Broce, 488 U.S. 563 (1989) 6, 7, 10, 11, 20

United States v. Bundy, 392 F.3d 641 (4th Cir. 2004) 24

United States v. Cornielle, 171 F.3d 748 (2d Cir. 1999) 9

United States v. Cortez, 973 F.2d 764 (9th Cir. 1992) 24

United States v. Cotton, 535 U.S. 625 (2002) 19

United States v. Cox, 464 F.2d 937 (6th Cir. 1972) 18, 19

United States v. Falcon, 347 F.3d 1000 (7th Cir. 2003) 9

United States v. Frazier-LeFear, 665 F. App'x 727 (10th Cir. 2016) 14

United States v. Goodwin, 457 U.S. 368 (1982) 9

United States v. Hollywood Motor Car Co., Inc., 458 U.S. 263 (1982) 5

United States v. Jackson, 390 U.S. 570 (1968) 8

United States v. McIntosh, 676 F. App'x 792 (10th Cir. 2017) 14

United States v. Overmyer, 899 F.2d 457 (6th Cir. 1990) 9

United States v. Sepe, 474 F.2d 784 (5th Cir. 1973) 18

United States v. Stevens, 559 U.S. 460 (2010) 15

United States v. Vonn, 535 U.S. 55 (2002) 24

United States v. Vukasinovic, 220 F. App'x 612 (9th Cir. 2007) 22

United States v. Williams, 341 U.S. 58 (1951) 17

Village of Maineville v. Hamilton Township Board of Trustees, 726 F.3d 762 (6th Cir. 2013) 8

Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017) 24

Welch v. United States, 136 S. Ct. 1257 (2016) 20

STATUTES

28 U.S.C. § 2255(f) 22

28 U.S.C. § 2255(h) 22

OTHER AUTHORITIES

Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919 (2015/2016) 15

Brief of United States, *United States v. Lee*, 855 F.3d 244 (4th Cir. 2017) (No. 15-6099), 2015 WL 9412180 14

Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 UCLA L. Rev. 360 (1978) 18

Fed. R. Crim. P. 11(b)(1)(N) 24

Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments 4, 17, 18, 19

Brian R. Means, *Federal Habeas Manual: Waiver of right to collateral review* § 1:63, Westlaw (database updated May 2017) 14

Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors (May 19, 2010) 23

Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, for All Federal Prosecutors (May 10, 2017) 23

John Bernard Mullady, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 Hous. L. Rev. 305 (1971) 18

2 Lester B. Orfield, *Criminal Procedure Under the Federal Rules* § 11:13 (1966) 11

Reply Brief of United States, *United States v. Pettiford*, 612 F.3d 270 (4th Cir. 2010) (No. 09-4119), 2009 WL 4883833 14-15

INTRODUCTION

The government acknowledges that in *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court identified certain "types of claims . . . as exceptions to the general preclusive effect of a guilty plea." Resp. Br. 13. The government's attempt to distinguish the claims at issue in *Blackledge* and *Menna* from a claim that the statute of conviction is unconstitutional rests on an unprincipled, unpersuasive, and unworkable distinction between challenges to the filing of charges and challenges to the ultimate conviction. Under the government's theory, the "*Menna-Blackledge* doctrine" recognized by the drafters of Federal Rule of Criminal Procedure 11(a)(2), this Court, and numerous lower courts, is no doctrine at all, but is instead largely limited to the facts of *Blackledge* and *Menna*. That position should be rejected. As Petitioner explained in the opening brief, a constitutional challenge to the statute of conviction attacks the State's very power to obtain or sustain a conviction. It is thus indistinguishable from the claims at issue in *Blackledge* and *Menna*.

The government's insistence that a conditional plea under Rule 11(a)(2) is the "exclusive" method to preserve constitutional claims for appeal is incompatible with its simultaneous recognition of the *Blackledge/Menna* "exception" to that Rule. Resp. Br. 11, 13. The Advisory Committee Note to Rule 11(a)(2) explicitly states that any case falling within the "*Menna-Blackledge* doctrine" is exempt from the Rule's conditional plea procedures, and the "doctrine" at that time included constitutional challenges to the statute of

conviction, as evidenced by the authorities cited in the Note. Those authorities described constitutional challenges to the statute of conviction as "jurisdictional" in nature, which renders irrelevant the government's reliance on the Note's reference to guilty pleas as waiving all "nonjurisdictional defects."

Though the government argues that "interests in efficiency, finality, and clarity" would be undermined by Petitioner's reading of Rule 11(a)(2), Resp. Br. 30, Petitioner's proposed default rule answers all of those concerns. Under that rule, rather than require a defendant to obtain the government's and the court's consent to enter a conditional plea explicitly preserving the right to appeal a constitutional challenge to the statute of conviction, this Court instead should require the government to obtain the defendant's consent via an explicit waiver of his challenge in a plea agreement. Such a rule takes account of the practical considerations that inform plea bargaining. Applying that rule to this case, Petitioner prevails, as the government concedes it did not obtain any written waiver from Petitioner.

In the alternative, this Court should remand for the D.C. Circuit to consider whether Petitioner's plea was voluntary, knowing, and intelligent given the district court's representations in the plea colloquy regarding Petitioner's appellate rights.

ARGUMENT

I. A Guilty Plea Does Not Inherently Waive The Right To Challenge The Constitutionality Of The Statute Of Conviction.

The government does not dispute that plea bargains "are essentially contracts," and that plea agreements should be interpreted in accordance with contract principles. Pet'r's Br. 18 (quoting *Puckett v. United States*, 556 U.S. 129, 137 (2009)). The government also concedes that, in his written plea agreement, Petitioner waived neither the right to appeal his conviction nor the right to challenge the constitutionality of his statute of conviction. Resp. Br. 48-49. Ordinarily, that would be the end of the matter because, under basic principles of contract law, parties cannot be held to a term to which they did not agree. The government, however, argues that even in the absence of any explicit waiver, Petitioner nonetheless relinquished his right to file an appeal challenging the constitutionality of his statute of conviction simply because he pled guilty. That argument is supported by neither law nor logic.

A. This Court Should Not Abandon Its Principled Approach For Determining Which Claims Are Preserved Post-Plea In Favor Of The Government's Unprincipled Approach.

As the government concedes, in *Blackledge* and *Menna* this Court recognized a category of constitutional claims that can be raised on appeal even after a plea of guilty. Resp. Br. 39-40. This Court established a principled standard for determining which "kinds of constitutional objections" fall within this

"*Menna-Blackledge* doctrine." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Pursuant to that standard, a defendant preserves claims that go to the State's very power to prosecute the defendant for the crime alleged. Conversely, a defendant is foreclosed from pursuing procedural and evidentiary claims that are rendered irrelevant by the admissions the defendant makes when pleading guilty. Pet'r's Br. 20-25.

The government rejects this Court's straightforward standard, instead inventing a new test under which a defendant preserves claims only when "the relevant constitutional violation [is] the filing of the charges," and forfeits claims when the relevant violation is "the entry of a conviction." Resp. Br. 39, 41. The government characterizes the former as "a right to avoid having to plead at all." *Id.* 44. The government's distinction is inconsistent with the nature of the claims at issue in *Blackledge* and *Menna*, unmoored from this Court's precedent, and unworkable.

1. The government's charges/conviction distinction cannot be squared with *Blackledge* and *Menna* themselves. The government does not dispute that in both *Blackledge* and *Menna*, the defendants had no "right to avoid having to plead at all." Resp. Br. 44. Instead, they were required to enter pleas, and then litigate their constitutional claims all the way to this Court. Pet'r's Br. 41. Exactly like Petitioner here, the defendant in *Menna* moved to dismiss his indictment and failed; elected to plead guilty rather than go to trial; and then appealed his conviction, claiming that the State could not constitutionally prosecute him for the offense

of which he had been convicted. 423 U.S. at 61-62. There is no meaningful distinction between these cases.

In drawing its charges/conviction distinction, the government relies primarily on *Blackledge*'s statement that the right at stake is the "right not to be haled into court at all." 474 U.S. at 30. But this Court has cautioned that a defendant advancing a prosecutorial vindictiveness challenge does not literally have a "right not to be haled into court at all"—he has no "right not to be tried"—and so, as the government admits, must await his conviction before pursuing an appeal. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268-69 (1982); Resp. Br. 41.

Nor does the government's distinction cohere with the nature of double jeopardy violations. "[T]he lynchpin for all double jeopardy jurisprudence" is that jeopardy does not attach until the jury is actually empaneled and sworn (or, in non-jury cases, until the first witness is sworn), meaning that the "very act of haling" the defendant into court does not "complete[] the constitutional violation," as the government argues (Resp. Br. 41 (quotation marks omitted)). *See Crist v. Bretz*, 437 U.S. 28, 37-38 & n.15 (1978); *Martinez v. Illinois*, 134 S. Ct. 2070, 2072 (2014).

The government's charges/conviction distinction thus cannot explain *Blackledge* and *Menna* themselves, where the relevant constitutional violations were not limited to the "filing of the charges" and did not provide defendants with a "right to avoid having to plead at all." Resp. Br. 39, 44.

2. The government's charges/conviction distinction likewise cannot explain this Court's other relevant precedents. Under the government's view that the *Blackledge/Menna* doctrine is limited to cases where the "relevant constitutional violation [is] the filing of the charges that forced the defendant to enter a plea," Resp. Br. 39, several of this Court's cases should have come out differently. For example, in *Tollett v. Henderson*, 411 U.S. 258 (1973), this Court held that the defendant's guilty plea precluded him from challenging his indictment on the ground that the grand jury was unconstitutionally selected on the basis of race. *Id.* at 266. Under the government's test, such a challenge should have been deemed preserved post-plea because "[t]he claim[] at issue" challenged the grand jury's "act of filing the charges," rather than the ultimate conviction. Resp. Br. 41; *Blackledge*, 417 U.S. at 30 (characterizing the defect in *Tollett* as a "tainted indictment").

Similarly, the government's theory cannot explain why the Court reached opposite outcomes in *Menna* and *United States v. Broce*, 488 U.S. 563 (1989). Both featured post-plea double jeopardy challenges to indictments, but only *Menna* held the challenge was preserved post-plea. Addressing *Menna*, the government asserts that a double jeopardy claim is preserved post-plea because it "is so intrinsically directed at the very authority of the Government to hale [the defendant] into court." Resp. Br. 41 (alteration in original) (internal quotation marks omitted). But if this explanation held water, *Broce*'s double jeopardy claim –

which could be described just this way – would not have been foreclosed. 488 U.S. at 576.

In contrast to the government's tortured reading of *Blackledge* and *Menna*, Petitioner's interpretation easily explains these outcomes. In *Tollett*, the unconstitutional method of selecting grand jurors was a procedural violation and therefore curable with "a new indictment by a properly selected grand jury." Pet'r's Br. 22-23 (quoting *Blackledge*, 417 U.S. at 30). The defendant accordingly could not challenge the violation post-plea because it did not "go to the very power of the State to bring the prosecution," and so a successful claim would not have the practical result of "prevent[ing] a trial from taking place at all." *Id.* at 23 (brackets in original) (internal quotation marks omitted).

And, unlike the defendant in *Menna*, the defendants in *Broce* could prove their double jeopardy claims only by contradicting their admissions in the indictments to which they pled guilty. *Id.* at 24-25. The claims accordingly were barred by the principle of *Tollett* and the *Brady* trilogy that "prohibits further inquiry into constitutional violations that become irrelevant" because they are inconsistent with a defendant's admissions of guilt. *Id.* at 25.[1]

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[1] The government points to *Brady v. United States*, 397 U.S. 742 (1970), as the case that proves its rule because the Court foreclosed a post-plea challenge even though the relevant defect could only be cured through "judicial invalidation" of an unlawful statutory provision. Resp. Br. 46-47. The government misunderstands the relevant standard. A violation is curable if a defendant could have been convicted of the same substantive crime (or given the same punishment for that crime) had different procedures or evidentiary

3. The government's charges/conviction distinction is also unworkable in practice because a constitutional challenge to the statute of conviction can be—and often is—conceived of as a challenge to the initiation of proceedings. Courts regularly characterize constitutional challenges to the statute of conviction as challenges to the "outset" of the proceedings rather than merely attacks on the conviction itself. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (when "laws are unconstitutional and void, the Circuit Court acquired no jurisdiction over the causes" (quoting *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1880))); *Vill. of Maineville v. Hamilton Twp. Bd. of Trs.*, 726 F.3d 762, 766 (6th Cir. 2013) (Sutton, J.) (noting that an "unconstitutional application of a statute" and a "statute that is unconstitutional in all of its applications" are both "void from the outset"); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) ("An unconstitutional statute is void *ab initio*, having no effect, as though it had never been passed."). This makes sense given that "only Congress, and not the courts, . . . can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-21

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rules been employed. *See Blackledge*, 417 U.S. at 30; Pet'r's Br. 23-24 n.3. In *Brady*, the defect inhered in the procedural aspect of the statutory scheme—that only by forgoing a guilty plea and proceeding with trial could a defendant face the death penalty. *Brady*, 397 U.S. at 745-46. This defect could have been cured by altering that procedural aspect, such as by allowing for capital punishment for those who pled guilty as well as those who opted for trial. *See United States v. Jackson*, 390 U.S. 570, 575-81 (1968). *Brady* is thus wholly consistent with the "curable" approach explained in *Blackledge*.

(1998). Even applying the government's standard, then, a constitutional challenge to a criminal statute is, at least in part, an attack on the initiation of proceedings.

4. The government also relies on the "presumption that a statute is constitutional" to argue that a defendant challenging the constitutionality of a statute on appeal is not challenging the "initiation of the prosecution." Resp. Br. 41. But that principle cannot distinguish constitutional challenges from double jeopardy and prosecutorial vindictiveness claims. There is also, after all, "a well-accepted principle that grand jury indictments are presumed valid." *United States v. Overmyer*, 899 F.2d 457, 465 (6th Cir. 1990); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999); *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) ("Only a defect so fundamental that it causes . . . the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried."). And, when a defendant alleges vindictive prosecution before trial, an additional presumption attaches "to the initiation of the prosecution": "[A] prosecutor's pretrial decisions, including the choice to seek increased or additional charges, are presumed valid." *United States v. Falcon*, 347 F.3d 1000, 1004-05 (7th Cir. 2005) (quoting *United States v. Goodwin*, 457 U.S. 368, 382 (1982)). Thus, the government cannot distinguish *Blackledge* and *Menna* on the ground that no presumptive validity accompanies prosecutions susceptible to double jeopardy or prosecutorial vindictiveness claims.

B. The Government's Attempts To Undermine Petitioner's Interpretation Of *Blackledge* and *Menna* Are Unavailing.

In addition to introducing a baseless new distinction, the government makes various other arguments in an attempt to undercut the straightforward logic of Petitioner's position that a constitutional challenge to the statute of conviction falls within the *Blackledge/Menna* doctrine. None have merit.

1. The government erroneously states, without citation, that by admitting guilt, a defendant "necessarily concedes that the conviction is not barred by then-applicable law." Resp. Br. 36; *see also id.* at 33-34. The government reaches this conclusion by misreading *Libretti v. United States*, 516 U.S. 29 (1995), and *Broce*. Both cases provide that, by pleading guilty, a defendant "admit[s] guilt of a substantive crime." *Broce*, 488 U.S. at 570; *Libretti*, 516 U.S. at 38 (citing *Broce*). But admitting guilt of a "substantive crime," as this Court normally uses that term, simply means admitting guilt of a crime that has been defined by the legislature. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 643-44 (1946) (defining what constitutes a "substantive" crime). It does not mean that the defendant agrees that the legislature can constitutionally criminalize that conduct. Reading either case for that proposition would be odd given that

neither case involved a constitutional challenge to the statute of conviction.[2]

To be sure, *Broce* notes that a guilty plea generally results in a "binding, final judgment of guilt." 488 U.S. at 569. But the defendants in *Blackledge* and *Menna* likewise had binding, final judgments of guilt until those judgments were overturned as unconstitutional. *Broce* simply reaffirms the validity of *Blackledge* and *Menna* as "[a]n exception to the rule barring collateral attack on a guilty plea," *id.* at 574, and the question before this Court is whether a challenge to the constitutionality of the statute of conviction falls within that exception. As discussed *supra* and in the opening brief, the analysis of the underlying claim in *Broce* provides further support for answering that question in the affirmative. Pet'r's Br. 24-25.

2. That question is also answered in the affirmative by *Haynes v. United States*, 390 U.S. 85 (1968), in which this Court found it obvious that "of course" a defendant's plea of guilty did not waive his right to bring a post-plea constitutional challenge to his statute of conviction. 390 U.S. at 87 n.2. The government attempts to explain *Haynes* by suggesting that perhaps the preclusive effect of guilty pleas was not well established when *Haynes* was decided, Resp. Br. 48, but that is not true, *see, e.g.*, 2 Lester B. Orfield, *Criminal Procedure Under the Federal Rules* § 11:13 (1966); *Hughes v. United States*, 371 F.2d 694, 696 (3d Cir. 1967); *Briley v. Wilson*, 376

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[2] The same is true of *North Carolina v. Alford*, 400 U.S. 25 (1970), and *Boykin v. Alabama*, 395 U.S. 238 (1969), also relied on by the government. Resp. Br. 45.

F.2d 802, 802-03 (9th Cir. 1967) (per curiam); *United States ex rel. Glenn v. McMann*, 349 F.2d 1018, 1019 (2d Cir. 1965); *Marchibroda v. United States*, 368 U.S. 487, 493 (1962). Indeed, as Petitioner already noted, the Fifth Circuit decision before the Court in *Haynes* observed that a guilty plea is generally "a waiver of all nonjurisdictional defects and defenses." Pet'r's Br. 27-28; *see infra* Part II.A (discussing use of the term "nonjurisdictional").

3. The government's reliance on a footnote from a two-Justice dissent in *Ellis v. Dyson*, 421 U.S. 426 (1975), Resp. Br. 43, does not change the analysis. *Ellis* featured a defendant who pled *nolo contendere* to a criminal charge but later sought to expunge the conviction by way of a § 1983 action on the ground that the statute of conviction was unconstitutional. 421 U.S. at 429-30. The *Ellis* majority outlined thorny standing and abstention questions for the district court to address on remand and, despite the dissent, did not opine on whether the petitioner could pursue his constitutional challenge given his plea. *Id.* at 434-35. *Ellis* is thus consistent with *Haynes*, as the Court refrained from treating the guilty plea as a hurdle to relief.

Moreover, both *Menna* and *Haring v. Prosise*, 462 U.S. 306 (1983), were issued after *Ellis* and reaffirmed that defendants are not precluded from raising post-plea a claim where "judged on its face the charge is one which the State may not constitutionally prosecute" because, in such a circumstance, "the State may not convict" the defendant "no matter how validly his factual guilt is established." *Menna*, 423 U.S. at 62 n.2; *Haring*, 462

U.S. at 321 (endorsing and applying *Menna* standard). Neither case adopted the view of the *Ellis* dissenters.

C. Petitioner's Retroactivity Analogy Is Sound.

The government misapprehends Petitioner's analogy to this Court's retroactivity jurisprudence. Petitioner is not wielding retroactivity doctrine as a tool for defying "normal litigation standards," as the government asserts. Resp. Br. 18-19. Petitioner is merely recognizing that the retroactivity standard for substantive rules "echoes" the standard for *Blackledge/Menna* claims, and that by the same logic, the *Blackledge/Menna* standard enables post-plea challenges to the statute of conviction. Pet'r's Br. 32. The government's insistence that the analogy is inapt because retroactivity arises only following a "definitively established" rule is unavailing. Resp. Br. 18. Just as neither a double jeopardy nor a vindictive prosecution violation need be "definitively established" for a defendant to pursue such a claim post-plea pursuant to *Blackledge/Menna*, neither does a constitutional challenge to the statute of conviction.

The government's attempts to reassure the Court that defendants will not be put in an impermissible Catch-22, in which they can never challenge the constitutionality of their statutes of conviction, on direct or collateral review, are likewise unpersuasive. Pet'r's Br. 34-35; Resp. Br. 19-21. Despite the government's suggestion to the contrary, Resp. Br. 20, courts regularly hold that defendants cannot get the benefit of retroactive new rules on collateral review where, as in Petitioner's case, the plea agreement explicitly waives the defendant's right to seek collateral review, J.A. 41;

see, e.g., *United States v. Frazier-LeFear*, 665 F. App'x 727, 731 (10th Cir. 2016); *Sanford v. United States*, 841 F.3d 578, 580-81 (2d Cir. 2016); *Crawford v. United States*, 501 F. App'x 943, 945 (11th Cir. 2012); Brian R. Means, *Federal Habeas Manual* § 1:63, Westlaw (database updated May 2017) (noting that federal circuits do not view a "post-plea change in the law favorable to the defendant" as significant to collateral waiver in plea agreements). And even where a plea agreement does not explicitly waive collateral review, the government's suggestion does nothing to address the injustice of requiring a defendant convicted under an unconstitutional statute to languish in the criminal justice system while awaiting a successful challenge to the statute mounted elsewhere.

The government claims that defendants might also be able to benefit from a substantive new rule holding that a statute of conviction is unconstitutional by claiming "actual innocence" to overcome procedural default. Resp. Br. 20. But it is unsettled whether "actual innocence" applies when a statute, after a change in law, no longer validly criminalizes the conduct that served as the basis of a conviction, or no longer validly authorizes the defendant's sentence. *See, e.g.*, *United States v. McIntosh*, 676 F. App'x 792, 795 (10th Cir. 2017); *Phillips v. United States*, 734 F.3d 573, 581-82 (6th Cir. 2013). And despite what the government says here, in other cases it has argued that a defendant cannot claim "actual innocence" in such circumstances. *See, e.g.*, Br. of United States at 34, *United States v. Lee*, 855 F.3d 244 (4th Cir. 2015) (No. 15-6099), 2015 WL 9412180; Reply Br. of United States at 16-18, *United States v. Pettiford*,

612 F.3d 270 (4th Cir. 2010) (No. 09-4119), 2009 WL 4883833.

With respect to the procedural bar for habeas petitioners who have not raised their constitutional challenges to the statute of conviction on direct appeal, the best the government can offer is leaving such petitioners "at the mercy of *noblesse oblige*," *United States v. Stevens*, 559 U.S. 460, 480 (2010), assuring the Court that the government "has the ability" to waive the procedural bar if it believes "defendants have meritorious substantive claims." Resp. Br. 20. In other words, the government asks the Court to trust prosecutors to sort good claims from bad claims and act in defendants' best interests. But "[a]s a general rule, one should not trust a prosecutor who says, 'Trust me.'" Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 Albany L. Rev. 919, 935 (2015/2016).[3] When there is a possibility that a defendant has been convicted for something that is not a crime, the stakes are too high.

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[3] The government claims that it is currently waiving the procedural bar for defendants sentenced with the statutory enhancement held unconstitutional in *Johnson v. United States*, 135 S. Ct. 2251 (2015). Resp. Br. 20-21. But even as to this, the government has been criticized for not "tak[ing] a consistent position." *Duhart v. United States*, No. 0:16-cv-61499-KAM, 2016 WL 4720424, at *3 n.6 (S.D. Fla. Sept. 9, 2016), *appeal docketed*, No. 17-11476 (11th Cir. Apr. 3, 2017).

II. Petitioner Was Not Required To Enter A Conditional Plea Under Rule 11(a)(2) To Preserve His Constitutional Challenges.

Despite its acknowledgement of the *Blackledge/Menna* "exception" to the preclusive effect of guilty pleas, the government argues that Rule 11(a)(2) provides the "*exclusive* procedure for preserving a constitutional challenge to a federal criminal statue to which a defendant pleads guilty." Resp. Br. 11 (emphasis added). But as the relevant Advisory Committee Note indicates, the Rule exempts the "*Menna-Blackledge* doctrine" from its reach. And that doctrine plainly includes more than just *Blackledge* and *Menna* themselves. The government's reliance on the Advisory Note's reference to guilty pleas waiving "nonjurisdictional defects" is misplaced given that the authorities otherwise cited in the Note specifically referred to constitutional challenges to the statute of conviction as "jurisdictional."

While the government argues that Petitioner's position would undermine "interests in efficiency, finality, and clarity," Resp. Br. 30, the government overlooks a rather obvious solution to its problem—requiring the government to obtain consent and an explicit waiver of rights from the defendant, rather than requiring the defendant to obtain consent and an explicit preservation of rights from the government and the court.

A. The Advisory Committee Note Supports Petitioner's Position That A Constitutional Challenge To The Statute Of Conviction Is Not Subject To Rule 11(a)(2).

When conditional pleas were first authorized by Rule 11(a)(2) in 1983, the Advisory Committee explicitly recognized this Court's holding "that certain kinds of constitutional objections may be raised after a plea of guilty." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendments. Citing *Blackledge* and *Menna*, the Advisory Committee stated that the conditional plea procedures prescribed by the Rule were to have "no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." *Id.*

Skipping over any explanation of what the Advisory Committee meant by its reference to the "*Menna-Blackledge* doctrine," the government instead stresses language elsewhere in the Advisory Note stating that "the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects." *Id.* The government insists that the Committee intended to use the "standard definition of 'jurisdictional,'" Resp. Br. 26, which could not have included constitutional challenges to the statute of conviction given that in *United States v. Williams*, 341 U.S. 58 (1951), this Court had already decided that such challenges were "nonjurisdictional," Resp. Br. 28.

The authorities relied on by the Committee indicate otherwise. The only authority the Advisory Note quoted at length treated *Blackledge*, *Menna*, *and* challenges to the statute of conviction as "jurisdictional." *See* Comment, *Conditioned Guilty Pleas: Post-Guilty Plea Appeal of Nonjurisdictional Issues*, 26 UCLA L. Rev. 360, 360 n.1 (1978) ("Unqualified guilty pleas do not preclude review of jurisdictional defects . . . . For example, the defendant may challenge the conviction where . . . the statute under which the prosecution is brought is unconstitutional . . . ."). In fact, *all* of the sources cited in the Advisory Note that discuss what constitutes a "jurisdictional" challenge characterize a challenge to the statute of conviction as raising a "jurisdictional" defect, *see id.*; *United States v. Cox*, 464 F.2d 937, 940 (6th Cir. 1972); *United States v. Sepe*, 474 F.2d 784, 788 (5th Cir. 1973), or argue that "jurisdictional" is so broad that it should encompass even post-plea Fourth Amendment claims, *see* John Bernard Mullady, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 Hous. L. Rev. 305, 313-15 (1971).

Indeed, in the *Cox* case cited by the Advisory Committee, the court went so far as to state that the "jurisdictional exception to the general rule [about the preclusive effect of a guilty plea] *has been limited to cases in which the accused is challenging the constitutionality of the statute*, usually on Fifth Amendment grounds, under which he is charged." 464 F.2d at 940 (emphasis added). In support of that statement, the Sixth Circuit cited this Court's decision in *Haynes*. *See id.* *Cox* also quoted a leading treatise at

the time as stating: "A defendant who has pleaded guilty is not barred from claiming . . . that the statute under which he was charged is unconstitutional. . . . The plea of guilty does waive, however, all nonjurisdictional defects in the proceeding." *Id.* (emphasis omitted) (quoting 1 Wright, *Federal Practice and Procedure: Criminal* § 175b) (citing multiple cases for this proposition).

The Committee did not cite or otherwise refer to this Court's decision in *Williams*, and from the authorities it did cite, it appears that the Committee at the time was using "[non]jurisdictional" in a "less than meticulous" manner, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); Pet'r's Br. 39, giving it a meaning far broader than "the courts' statutory or constitutional power to adjudicate the case," *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis omitted); Resp. Br. 16.[4]

B. Petitioner's Proposed Default Rule Fully Addresses The Government's Finality, Efficiency, And Clarity Concerns.

The government argues that if defendants are not required to preserve constitutional challenges to the statute of conviction under the conditional plea procedures of Rule 11(a)(2), this would destroy the finality of pleas, produce inefficiency, and create costly ambiguity. Resp. Br. 30-31. None of these concerns should give this Court any pause about adopting the

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[4] Even if the Committee were using "nonjurisdictional" in the manner the government claims, the Committee separately exempted claims under the "*Menna-Blackledge* doctrine" from the general bar on nonjurisdictional claims. Pet'r's Br. 39 n.5.

default rule Petitioner advocates. *First*, where the conviction or sentence is not authorized by law, "finality interests are at their weakest," *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016), because there is "little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose," *id.* (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.)); *see also* Pet'r's Br. 32-33.

Second, the government's concerns about inefficiencies are premised on its assumption that constitutional challenges to a statute of conviction will demand additional factual development or will not prove dispositive. Resp. Br. 31-32. But that is not the rule Petitioner advocates and is not consistent with this Court's precedent: Challenges with the former attribute do not fall within the *Blackledge/Menna* exception under *Broce*, Pet'r's Br. 43 (citing *Broce*, 488 U.S. at 569), and challenges with the latter attribute would not go to the very power of the government to prosecute the case.

Third, as to the concern that the government will not "know[] exactly what it gets for its concessions in the plea agreement," Resp. Br. 30, there is an easy solution. The government should be required to obtain an explicit waiver of a defendant's rights in the plea agreement rather than requiring the defendant to explicitly preserve them. In fact, the government has noted that many federal plea agreements already contain explicit waivers that "independently bar a challenge to the statute of conviction on appeal." BIO 17.

C. Practical Considerations Weigh In Favor Of Adopting Petitioner's Proposed Default Rule.

In the realm of criminal procedure, this Court has acknowledged that practical considerations inform its determinations. *See Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012) (rejecting an argument that "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials"); *Missouri v. Frye*, 566 U.S. 133, 143-44 (2012) ("Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop . . . ." (quoting *Lafler*, 566 U.S. at 170)). Since the Court is asked here to determine a default rule around which defendants and the government will bargain in the future, the Court's choice is in part one about which side should bear that default rule's burden. Practical considerations favor placing the burden on the government.

The cost to a defendant who mistakenly forfeits his right to challenge the constitutionality of the statute of conviction is great. As this Court established over 135 years ago and reaffirmed just last year, "[a]n unconstitutional law is void, and is as no law." *Montgomery*, 136 S. Ct. at 731 (alteration in original). Thus, a default rule that burdens defendants may punish some people who have committed no crimes. These high stakes alone are a "practical justification for singling out th[e]se cases as ones in which" placing the burden of "the consent requirement" on the defendant "would be problematic." Resp. Br. 32.

As *amici* point out, the pressures criminal defendants face to plead are immense, while the

resources they and their attorneys have access to are often sparse. *See* NACDL Amicus Br. 6-10; Innocence Project Amicus Br. 6-15. It is not sufficient to point to the hypothetical possibility of habeas relief as a backstop in the event a defendant forfeits his constitutional challenge because of his ignorance of the default rule. Even a later decision holding that the defendant's statute of conviction *is*, in fact, unconstitutional, is no guaranteed panacea, given the many procedural obstacles to seeking habeas relief. *See* 28 U.S.C. § 2255(f), (h) (one-year limitations period and restrictions on subsequent or successive petitions); *supra* (discussing collateral review waivers and the habeas procedural bar).

It does not matter that the government has refrained from "*habitually* withhold[ing] consent for conditional pleas," Resp. Br. 32 (emphasis added), and that it can come up with 56 examples of cases in which consent was granted. The government certainly does not grant consent in all cases, *see, e.g.*, *United States v. Vukasinovic*, 220 F. App'x 612, 614 (9th Cir. 2007), nor does it have any obligation to do so. Given the government's view that Petitioner's Second Amendment claim is "insubstantial" and that his vagueness claim was "forfeited," BIO 15-16, it is unclear whether the government even would have consented to a conditional plea in this case.[6]

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[6] The merits of Petitioner's constitutional claims are not before this Court, but contrary to the government's view, they are neither insubstantial nor forfeited. *See* D.C. Cir. Reply Br. 15-29.

Moreover, even if current government policy is not to "habitually" withhold consent, government policy can change. *Compare, e.g.*, Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors (May 19, 2010) (directing federal prosecutors to make charging decisions "in the context of 'an individualized assessment [of the case]'"), *with* Memorandum from Jefferson Sessions, Att'y Gen., U.S. Dep't of Justice, for All Federal Prosecutors (May 10, 2017) (directing federal prosecutors to "charge and pursue the most serious, readily provable offenses" in every case). And in any event, tremendous discretion is left to individual prosecutors. The government's exhortation to trust its *noblesse oblige* is not enough.

III. In The Alternative, The District Court's Misrepresentation Of The Default Effect Of Petitioner's Plea Requires Remand To Determine Whether Petitioner's Plea Was Voluntary, Knowing, And Intelligent.

The government misapprehends the nature of Petitioner's alternative argument that this Court should remand for a determination concerning whether the plea was voluntary, knowing, and intelligent. Pet'r's Br. 44-46. Petitioner's claim derives not from a subjective misunderstanding on his part, but from the district court's misrepresentation regarding the default effect of a guilty plea.

This Court has repeatedly recognized that a court's misrepresentation can prevent a guilty plea from being voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Bousley*, 523 U.S. at 618-19. Following this Court's lead, many circuits have ruled

that when a court misrepresents the effect of a guilty plea, the defendant must be afforded the opportunity to withdraw the plea. *See, e.g.*, *United States v. Cortez*, 973 F.2d 764, 767-69 (9th Cir. 1992); *United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004).[6] If the Court holds that Petitioner cannot appeal to challenge the constitutionality of the statute under which he was convicted, then the district court misrepresented the default effect of Petitioner's guilty plea when it told Petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." J.A. 63.

Contrary to the government's suggestion, Resp. Br. 50-51, this Court often remands for lower courts to address questions that arise from the Court's resolution of the question presented. *See, e.g.*, *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 n.1 (2017). In fact, it has done so in this precise context. *See Tollett*, 411 U.S. at 268-69 (remanding because "we are not in a position to say whether [respondent] is presently precluded from raising the issue of the voluntary and intelligent nature of his guilty plea," *id.* at 268). Should the Court rule against

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[6] The government's reliance on *United States v. Vonn*, 535 U.S. 55 (2002), is misplaced. Resp. Br. 50. *Vonn* concerned the standard of review for a Rule 11 error. 535 U.S. at 62-63. But Petitioner does not allege the court erred when describing "the terms of a[] plea-agreement provision waiving the right to appeal," Fed. R. Crim. P. 11(b)(1)(N); rather, he alleges the court erred while going *beyond* its Rule 11 obligations and misinforming Petitioner about his appellate rights, which were not part of the plea agreement.

Petitioner, it should remand for a determination of whether his plea was voluntary, knowing, and intelligent.

CONCLUSION

The judgment of the District of Columbia Circuit should be reversed.

Respectfully submitted,

JESSICA RING AMUNSON
Counsel of Record
JOSHUA M. PARKER
CORINNE M. SMITH
LEONARD R. POWELL*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

*Admitted in California only;
supervised by principals of the firm